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Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 32

GALE H. JOHNSON,
Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINION BELOW.

The orders of the United States District Court, Southern District of Iowa, are found at A. 38 and A. 57 and are not officially reported. The opinion of the United States Court of Appeals for the Eighth Circuit appears at A. 71, and is reported at 386 F. 2d 677 (1967).

JURISDICTION.

The judgment of the United States Court of Appeals was entered on November 28, 1967. Petition for writ of certiorari was filed on February 19, 1968, and certiorari was granted April 1, 1968. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

The Constitution of the United States, Article XIV, Sec. 1: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13880, Iowa Code (1931): "Defense witnesses at expense of state. Witnesses for the defense shall be subpoenaed at the expense of the county only upon the order of the court or judge thereof before which the case is pending, made upon a satisfactory showing that the witnesses are material and necessary for the defense, which order may be made at the time of the trial or other disposition of the case. The board of supervisors shall not allow any claims for fees of witnesses not thus authorized."

QUESTIONS PRESENTED.

Was the accused deprived of a fair trial when a witness subpoenaed by the accused was jailed during the term of the accused's trial, where the law enforcement office charged with the duty of serving said subpoena incorrectly reported to court and counsel that the sought witness was confined in a mental institution?

When the defendant introduces proof of alibi, may a state constitutionally shift the burden of proof to the accused and require the defendant to prove his absence from the scene of a crime as a condition for acquittal?

Is proof of the prosecutor's complicity in the preparation of false evidence required to reverse a conviction obtained after a trial in which the false evidence was introduced by the state?

STATEMENT.

Gale Johnson was indicted for the murder of a police officer in Burlington, Iowa, which fatality occurred on the morning of May 27, 1934, at approximately 5:30 a.m. (A. 84). He entered a plea of not guilty to this indictment, and the case went to trial on November 13, 1934 (A. 38-39). Although the defendant did not take the stand, he sharply disputed his guilt and his presence at the scene of the crime. Several witnesses testified that they saw the defendant in his home city of Des Moines, Iowa, on the day of the fatality; Des Moines being situated approximately 165 miles from Burlington. These witnesses included the owner of a gas station who related that he filled the tank of the defendant's car in Des Moines at about the time of the Burlington fatality, and the owner of a business establishment who saw the defendant in his place of business on the same morning (A. 103, A. 105).

Bearing adversely on the testimony of these alibi witnesses, the prosecution produced two notes allegedly written by the petitioner for secret transmittal to persons outside the penitentiary, the petitioner by these notes purporting to direct the preparation of the alibi defense (Pet. Ex. 16, 18, A. 126; Habeas Corpus hearing transcript, hereafter referred to as HR. 80-82). Evidence presented in petitioner's habeas corpus trial below demonstrates that these notes were not prepared by Gale Johnson, and this false evidence has now been repudiated by both the state and the petitioner (A. 56, 120; Resp. Ex. 2, A. 128; HR. 197).

At the petitioner's 1934 trial, the fraudulent notes were introduced through the testimony of two felons who were incarcerated at the prison where Gale Johnson was being held (A. 87-89). Upon trial of *State* v. *Johnson* these prisoners were charged with providing, for reward and gain

promised them by the state, assistance in the prosecution's effort to convict Gale Johnson. This charge was made by Mr. Yates, a witness who stated that he had himself received an offer of money to help the authorities in this project, which offer he refused (A. 107-109). The state's response to this assertion appears in closing argument to the jury at A. 110.

In addition to the notes, another area of testimony is material to the questions presented for review. There were no eyewitnesses to the fatality itself, but the state produced two witnesses who identified the defendant as one of two men fleeing the scene shortly after the homicide. The witnesses saw the two murder suspects only briefly from significant distances under circumstances of visual obstruction (A. 74). Their identification of the petitioner was made some time after the occurrence of the crime, and it appears that one of the witnesses also made an identification of another man along with Gale Johnson as implicated in the homicide. This other man whom the witness purportedly observed was Thomas Orsucci (Pet. Ex. 24, 20, A. 130, 132; HR. 154, 157). Mr. Orsucci was arrested, brought to Burlington, and charged with murder (A. 117, 132). This identification was later proven to be in error. As a result, Mr. Orsucci was released from custody on August 20, 1934 (Pet. Ex. 23, A. 133; HR. 158).

When Gale Johnson's case later came on for trial, Mr. Johnson reasoned that Orsucci's testimony would weigh heavily with the jury in determining whether to believe the witnesses who placed him in Des Moines, as opposed to those who claimed they saw him in Burlington on the morning of the homicide. In addition, the Burlington authorities had apparently announced in advance of trial that Orsucci had been identified as being in a tavern with Johnson in the Burlington area the night before the fatality (A. 131). Mr. Johnson applied to the trial court, requesting that a

subpoena issue for Thomas Orsucci (A. 92). The trial court issued the subpoena, and it was sent to Polk County, Iowa, Sheriff's office for service on the witness. Shortly thereafter, that sheriff's office advised that Orsucci was not served with subpoena because he was institutionalized at the Clarinda mental hospital (Pet. Ex. 3, A. 125; HR. 17). This was incorrect. Mr. Orsucci was being held in the Polk County jail at the time that this information respecting institutionalization was being supplied by the sheriff's office (A. 59, n. 1; 77; 117). No transfer of the witness to the Clarinda mental institution took place, and the record is void of any evidence that such a transfer was ever contemplated (A. 34, 39, 77).

In view of the fact that various witnesses had testified that Gale Johnson was in and about Des Moines near the time of the homicide in Burlington, the trial court specifically directed the jury regarding the burden of proof to be cast upon the accused. The court charged the jury that in order to acquit the defendant on the basis that defendant may have been elsewhere at the time of the crime, the defendant was required to prove that he was elsewhere.[1] Petitioner's original trial concluded on Novem-

1. Jury instruction 16, objected to by the defense, is found at A. 94 and stated as follows:

> 16. Evidence has been admitted on behalf of the defendant of what is known as an alibi, which means that the defendant at the time that the alleged murder is charged to have been committed, was at another place so that he could not have committed the same. You are instructed that such a defense is proper and legitimate as any other, and you are also instructed that you scan the proof of alibi with care and caution, and all the evidence upon this point both for and against this claim of alibi should be scrutinized with care and carefully considered by the jury.
>
> The burden is upon the defendant to prove this defense by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another

ber 24, 1934. The jury rejected the charge of first degree murder, and instead rendered a verdict of guilty of murder in the second degree (A. 97). On December 10, 1934, the trial court sentenced the petitioner to life imprisonment (A. 102), which sentence he continues to serve. His conviction was affirmed on appeal. *State* v. *Johnson*, 221 Iowa 8, 264 N. W. 596. See also *State* v. *Johnson*, 221 Iowa 8, 21, 267 N. W. 91, correcting certain errors made by the Iowa Supreme Court in its first opinion.

After several of the significant facts disclosed above were discovered, the petitioner attempted to obtain an evidentiary hearing in state habeas corpus. His efforts were unsuccessful (A. 9-10). His last petition in this regard resulted in a summary order of the Iowa Supreme Court denying relief (A. 20). Petitioner thereafter filed a petition for federal habeas corpus on February 16, 1966 (A. 4). His petition was originally denied without hearing (A. 38). After counsel appeared for the petitioner and moved to reconsider, an evidentiary hearing was ordered (A. 49, 57). At this hearing, a leading expert on handwriting analysis demonstrated that the notes produced by the state at petitioner's original trial were not written by the petitioner, contrary to the trial testimony of the state at that time (A. 117-125). These notes were also submitted to the state's present handwriting expert at the Bureau of Criminal Investigation, and this expert fully agreed that the petitioner did not author the inculpatory notes (Resp. Ex.

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place so far away, or under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has so shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon that point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him.

2, A. 128; HR. 197). As a result, the respondent conceded that the introduction of the notes at petitioner's original trial was incorrect (A. 56, HR. 197). In addition, the important facts concerning the incarceration of witness Orsucci during petitioner's original trial were spread upon the record at his habeas corpus trial.

Notwithstanding the cited evidence, the United States District Court denied habeas corpus relief (A. 57). The decision of the District Court was affirmed on appeal (A. 71), the Court of Appeals emphasizing the need to present direct proof of prosecutorial complicity in the fabrication of evidence or suppression of testimony in order to successfully attack a conviction. The court below stated: "So far as we have been able to ascertain, all the Supreme Court cases setting aside convictions for want of due process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed." (A. 75.)

After the District Court denied habeas relief, it issued a certificate of probable cause to the petitioner to appeal, the court indicating concern over the Iowa trial court's procedure in shifting the burden of proof to the accused (A. 66). The District Court had previously characterized as confusing and inconsistent the jury charge which had this effect (A. 43). On appeal, the Court of Appeals found that this jury instruction did place the burden of proof on the accused, and pointed out that the great weight of authority supported the view that such an instruction is erroneous. However, the court below noted that the Supreme Court of the United States has not passed upon the validity of this type of instruction (A. 80).

SUMMARY OF ARGUMENT.

A. When governmental suppression of evidence occurs, due process of law is violated regardless of whether the suppressing official is the prosecutor or a law enforcement officer. Deception by a governmental officer when the accused is engaged in the crucial business of securing trial witnesses is antagonistic to the due process mandate.

The record in the instant case indicates that a defense witness subpoenaed under order of the trial court was withheld from the trial of the case under circumstances which constituted suppression of evidence. The suppressed witness had been a central figure in the subject murder investigation, and his presence at Gale Johnson's trial was ordered by the trial court under a state statute which required such court to establish the materiality of the sought evidence prior to issuance of the subpoena. Allowing suppression of the witness in these circumstances would authorize police officers, and not the defendant, to decide with impunity which witnesses the accused would be permitted to present in his defense. Such a concept is at war with due process of law.

B. False evidence in the form of forged notes was introduced by the prosecution at petitioner's trial. The petitioner, on trial for his life, was afforded scant opportunity to view these notes prior to trial, notwithstanding the fact that the prosecution had possession of these items several months in advance. The employment of such evidence achieved "pollution of the waters of justice" and deprived the conviction of its due process base. The view of the court below, to the effect that there is no unsettling vice in the employment of tainted evidence absent a showing of prosecutorial complicity, should be corrected. The decisions of this court are clear on the point that the due process

mandate in the false evidence cases is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.

C. Significant decisional authority indicates that an issue of marked constitutional significance is posed by virtue of the fact that the burden of proving alibi was placed upon the defendant. *Glover* v. *United States,* 147 Fed. 426, takes the position that such a procedure conflicts with the presumption of innocence, a fundamental rule of our criminal law. The jury was told in the prosecution's closing argument and by the court's instructions that in order for the defendant to prevail under his claim of non-presence at the scene of the crime, he was required to prove that he was elsewhere. Inasmuch as the burden should fall on the government to establish the guilt of the accused in the face of any conflicting evidence, including the burden of proving the presence of the accused at the scene of the crime where that is an essential element of the state's case, the procedure employed in the subject cause was fatally in error.

ARGUMENT.

A. SUPPRESSION OF EVIDENCE BY THE GOVERNMENT IN A CRIMINAL PROSECUTION COLLIDES WITH FUNDAMENTAL PRECEPTS OF FAIRNESS AND DUE PROCESS.

The fact that a defense witness was held in jail during the trial of the accused, and that a misrepresentation respecting the whereabouts of the witness was promulgated by the authorities, does not appear seriously disputed in this proceeding. Indeed, the federal District Court below found that Thomas Orsucci was incarcerated in the Polk County jail from November 15, 1934 to December 8, 1934, and that the sheriff's return was made on November 19, 1934 (A. 39; 59, n. 1). The Court of Appeals reasoned that the evidence on the point "establishes a prima facie case that the return of the Polk County sheriff is false." (A. 77.) The Court of Appeals did not consider this deception decisive, however, apparently for two reasons. First, the court pointed to an absence of evidence demonstrating that the trial prosecutor himself had knowledge of the false reporting (A. 77). Second, the court questioned whether the witness sought by the subpoena was of value to the defense (A. 79).

Petitioner respectfully contends that active suppression of evidence by the government vitiates the conviction of an accused person, whether that suppression is accomplished by the trial prosecutor or another arm of the state. *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842, 846 is a well reasoned decision which points out that the duty to desist from suppression extends to all officers in the state's official process. *Barbee* involved a federal habeas corpus attack upon a state court conviction wherein the

state prosecutor failed, either through lack of knowledge or for some other reason, to disclose evidence relevant to the defense, which evidence was in the possession of the police. The state contended that defendant was not entitled to habeas relief because he failed to show that the prosecuting attorney himself participated in the suppression of the evidence. The Court of Appeals ruled that failure to reveal material evidence is harmful to a defendant whether such withholding is accomplished by the prosecutor or another officer of the government. "The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. . . . The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused." 331 F. 2d at 846. See Comment, 42 N. Y. U. L. Rev. 764, 766 (1967). *Barbee* further indicates that in cases of active misconduct by the prosecution, as opposed to passive nondisclosure of evidence, the conviction should be set aside without inquiring into whether the defendant has been prejudiced. In view of the record, the misconduct in the case at bar would appear to fall into the first category.

This Court made abundantly clear in *Brady* v. *Maryland*, 373 U. S. 83, 87, that suppression by the prosecution of material evidence favorable to an accused violates due process. As in the instant case, the accused in *Brady* requested production of the desired evidence, only to have certain of that evidence suppressed. Such suppression cannot be tolerated because of the hallmark principle of American jurisprudence that society wins in a criminal case only when the accused is treated fairly. 83 U. S. at 87. See also *Giles* v. *Maryland*, 386 U. S. 66, 70, 74, which condemns suppression of evidence relevant to the cred-

ibility of a government witness, credibility constituting a critical issue in the case.[2]

The instant matter would appear to present an especially aggravated situation. The witness sought by the defense had been specifically requested under an Iowa statute which authorized service of subpoenas at state expense only if the trial court found the witness to be "material and necessary" to the defense. Section 13880, Iowa Code (1931).[3] The Court of Appeals decision questioned the materiality of the evidence sought from Thomas Orsucci. However, at no point in its opinion did that court discuss the effect of the above statute on this issue, although the point was specifically raised below by the petitioner.[4] Petitioner's contention is that the trial court's 1934 issuance of the subpoena under the aforesaid statute stands as a prior ad-

2. Other significant decisions which apply the long-standing proscription against governmental suppression of evidence include *Pyle* v. *Kansas*, 317 U. S. 213; *Alcorta* v. *Texas*, 355 U. S. 28. See *Curran* v. *Delaware*, 259 F. 2d 707, 712-13 (suppression of evidence by an officer deemed fundamentally unfair; misconduct of police invalidated state court conviction in federal habeas corpus, and rule does not depend upon personal participation of prosecutor in misconduct); *Augenblick* v. *United States*, 377 F. 2d 586, 598 (In evidence-suppression cases, activities of investigating officials are generally attributed to the prosecution); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 570-71; *Hamric* v. *Bailey*, 386 F. 2d 390. See also Note, 34 Brooklyn L. Rev. 269 (1968); Comment, 34 Tenn. L. Rev. 654, 660-63 (1967); Comment, 6 Duquesne L. Rev. 41, 45-56 (1967); Note, 2 Suffolk L. Rev. 272, 286-87 (1968).

On the importance of safeguarding the accused's right to subpoena witnesses, see *Washington* v. *Texas*, 388 U. S. 14.

3. The cited section controlled the issuance of defense subpoenas at the time of the Johnson trial in 1934. A similar section appears in the 1966 Code of Iowa, Section 781.2. The statute underwent minor revision in 1967, the legislature deleting the words "or judge thereof" from the first sentence of the provision. Acts 1967 (62 G. A.) ch. 400. Otherwise, the section today remains in the same form as the section contained in the 1931 Code.

4. Petitioner's Brief, United States Court of Appeals, pp. 12-13; Petitioner's Reply Brief, p. 4.

judication of materiality, in light of the statute's requirement that the subpoenaed witness must be material to the defense. The trial court was on the scene in 1934 when it issued the subpoena under these conditions; it would appear inappropriate now to disturb that finding.

That Thomas Orsucci occupied a central role in the events which occurred in Burlington, Iowa, in 1934 appears to be beyond dispute. He was charged with the murder in question, released, and later incarcerated during the petitioner's trial (A. 33, 34; Pet. Ex. 24, A. 130, HR. 154; Pet. Ex. 20, A. 132, HR. 157; Pet. Ex. 23, A. 133, HR. 158). His testimony appears both relevant and admissible. The petitioner selected him as a source of testimony for jury consideration, and it would seem that the petitioner and his counsel should be permitted to determine the trial strategy for the defense. They should decide whom the accused will call as defense witnesses, and the decision should not be made for them by a police department or a sheriff's office through the incarceration of requested witnesses. Such an extra-judicial overruling of a decision by an accused person to call any witness is in conflict with the due process mandate.

B. THE EMPLOYMENT OF FALSE EVIDENCE IN SECURING THE CONVICTION OF AN ACCUSED PERSON DESTROYS THE VALIDITY OF SUCH CONVICTION.

The use of false documents against an accused person is antagonistic to the basic tenets of a civilized legal system. The record in this case indicates that false evidence found its way into the trial. Recent evidence appears to clearly establish petitioner's long-maintained stand on this issue, to wit: state's exhibits one and two at his original trial were not written by the petitioner, contrary to the state's testimony at that time.

Because handwriting analysis is crucial to this issue, the testimony of a leading authority in this field has been set forth at some length in the Appendix (A. 117-125). Professor Winsor Moore, a member of the American Society of Questioned Document Examiners and the American Academy of Forensic Sciences, carefully detailed the dissimilarities between the false notes (original state's exhibits 1 & 2), and the petitioner's 1934 handwriting which appears on an exemplar card petitioner was required to complete prior to trial (Pet. Ex. 15; A. 127; HR. 77). Professor Moore explained that any attempt to disguise the handwriting or printing, should the petitioner have printed the introduced evidence with a strained or abnormal writing style, would be easily detectable. His testimony is definite that the petitioner did not write the notes (A. 120).

With appreciated frankness the state has indicated agreement with this position (A. 56; HR. 197). Prior to the habeas corpus hearing below, the state submitted the challenged exhibits to the questioned documents examiner at the Iowa Bureau of Criminal Investigation, and his findings are in accord with those of Professor Moore (Resp. Ex. 2, A. 128; HR. 197).

The situation was considerably different in Burlington, Iowa, in 1934, however. At that time the state produced a handwriting analyst who testified before the jury that the petitioner had prepared the notes, a proposition explored by the prosecutor in closing argument (A. 110-112). In fact, the subject of the notes in question occupied all or part of the testimony of five state witnesses at the original trial (A. 87-89; Original Transcript Record 166-205). There, after establishing that the petitioner printed the exemplar card heretofore mentioned, the state went on to illustrate to the jury that the person who printed the exemplar card (Gale Johnson) was the same person who printed the notes, state's exhibits one and two. The impor-

tance attached to the notes as evidence is indicated by their numeral position in the chain of state exhibits, and is borne out by examination of the closing argument of the prosecutor. He pressed home to the jury testimony concerning the evidence in pointing them to the "fact" that Gale Johnson authored the notes in question—a "fact" now conceded to be untrue. Attribution of these notes to the petitioner cast him in a very bad light, and in a case in which the jury's assessment of alibi evidence was crucial, state's exhibit 2 (A. 126) was especially damaging. The considerable lengths to which the state went to produce the improper evidence, substantial attendant testimony relating to the notes after they were received in evidence, and reliance by the prosecution on the false documents in closing argument indicate that prejudicial error within the meaning of *Chapman* v. *California,* 386 U. S. 18, occurred in the trial proceedings. *Anderson* v. *Nelson,* 88 S. Ct. 1133; *Fontaine* v. *California,* 88 S. Ct. 1229.

The court below did not question the material role played by the false evidence in petitioner's trial but again placed major reliance on the absence of proof of prosecutorial complicity in preparation of the forgeries. The Court of Appeals stated that all the Supreme Court cases setting aside convictions because of false evidence are based upon guilty knowledge of the prosecutor, and further stated that this is the proper rule (A. 75). This position appears clearly erroneous in view of this court's pronouncements in *Brady* v. *Maryland,* 373 U. S. 83, 87; *Pyle* v. *Kansas,* 317 U. S. 213; and *Napue* v. *Illinois,* 360 U. S. 264, 269. The *Brady* decision illustrates that the due process mandate in the false evidence cases "is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused." See Note, 74 Yale L. J. 136, 142 (1964). *Pyle* v. *Kansas* was summarized in *Curran* v. *Delaware,* 259 F. 2d 707, 713: "An examination of

the record in the *Pyle* case discloses, as the learned Judge below pointed out, that the prosecuting officer was in no wise a party to or cognizant of the perjured testimony given by certain witnesses of the State of Kansas. . . ." The *Curran* case also involved the production of false evidence, and the United States Court of Appeals there concluded that the introduction of false evidence caused the defendant's trial to pass the line of tolerable imperfection and fall into the field of fundamental unfairness.

In *Jones* v. *Commonwealth of Kentucky,* 97 F. 2d 335, 338, defendant was convicted in state court of murder upon the testimony of two witnesses, one of whom testified to the decedent's dying declaration. New evidence was presented in federal habeas corpus indicating that the witness who allegedly heard the dying declaration was not in fact present at the demise of the deceased and did not have knowledge of the things she testified to. The federal Court of Appeals noted that the infirmity of the trial evidence was not disclosed until after conviction, and the court's decision dealt with the problem of false evidence in criminal trials wherein the falsity is unknown to the prosecuting officers. The Court concluded that due process must condemn with "equal abhorrence" a conviction based upon false evidence either known or unknown to the prosecutor.

The *Jones* case also made the point that the defect in the trial evidence might have been discovered "had reasonable opportunity for investigation been accorded the defendant and his counsel." 97 F. 2d at 338. The statement raises a point relevant to the instant case as well. The record indicates that the trial prosecutor received the subject notes in July, 1934, and that he held them for several months before giving notice of their existence to the accused (A. 87, 90). Iowa law requires that the accused be given notice of the state's evidence prior to trial,[5] and

5. Section 780.10, Iowa Code (1966), formerly Section 13851, Iowa Code (1931).

in connection with other major portions of the state's case such notice was given with the indictment almost two months before trial. The state's notice respecting the notes was served on the petitioner in his jail cell six days before the start of the trial (A. 90; HR. 181-82), and not upon his attorney. Petitioner wrote to his lawyer respecting the new evidence immediately but by the time the correspondence was received trial counsel was able to visit with the petitioner only briefly before trial respecting this new development (A. 60-61). The prosecution's withholding of this notice respecting the false notes, the notes having been in the prosecution's hands for several months, afforded petitioner scarce opportunity to subject the evidence to the detailed screening by an expert which would have revealed its falsity.

The genesis of the false notes remains shrouded in mystery. Mr. Yates, a witness for the defense, was about to disclose his knowledge respecting their preparation, but he was cut off from further testimony in this regard (A. 108). In analyzing the question of who prepared the notes, the record does not contain direct proof on this issue. However, it is perhaps relevant to explore briefly the climate created at the jail from which the forgeries came. Mr. Yates testified that the trial prosecutor went into the penitentiary and offered him a sum of money, to wit $25.00, to provide the names of certain of petitioner's defense witnesses (A. 108-9). He claimed that other offers and promises had been given to the prisoners who ultimately produced the false notes. In closing argument the prosecutor responded to this allegation by saying, "Before I go into that I want to say that the State would have been glad to have paid Yates $25.00 to get the names of the alibi witnesses." (A. 110.) If this statement confirms Yates' testimony respecting offered pecuniary inducements, it would appear that a climate of encouragement may have

been created by the prosecution for the preparation of false evidence.

Exactly who was guilty of forging the notes may be the subject of conjecture. But one cardinal fact set forth in the record appears beyond dispute. That is the fact that all the current evidence based upon modern skills and techniques indicates clearly that Gale Johnson did not author the inculpatory notes which formed significant links in the chain of prosecution evidence at his trial. The important principles announced by this Court proscribing the employment of false evidence in criminal prosecutions form crucial protections for all accused persons, and the instant case poses a most significant example of the critical necessity for these rules.

C. THE PRESUMPTION OF INNOCENCE FORMS A BASIC PROTECTION FOR ALL ACCUSED PERSONS, AND CASTING THE BURDEN OF PROOF ON A DEFENDANT IN A CRIMINAL CASE VIOLATES THIS HISTORIC SAFEGUARD.

An issue which created major concern on the part of the United States District Court as well as the Court of Appeals was the important question raised by the method employed to shift the burden of proof to the accused. At the conclusion of petitioner's trial the jury was directed that in order for the petitioner to be acquitted by reason of his claim of non-presence at the scene of the crime, he was required to prove that he was elsewhere. Both of the courts below found that this direction to the jury placed the

6. Petitioner does not infer by this reference that any payment was made for the production of evidence known by the prosecution to be false. What petitioner does contend is that record testimony indicates that offers of financial reward were made to those willing to assist the prosecution. While the above-quoted reference to this subject in closing argument may not be completely clear, one reasonable interpretation would appear to be that the prosecution admitted that pecuniary offers had been made.

burden of proving alibi on the defendant (A. 42, 79), and *Glover* v. *United States,* 147 Fed. 426, 430-33, indicates that such a jury charge raises an issue of constitutional import.

Specifically, *Glover* takes the position that the giving of a burden-shifting alibi instruction constitutes prejudicial error and violates basic constitutional guarantees in criminal cases, to wit: the presumption of innocence and the rule that the accused must be proven guilty beyond a reasonable doubt.[7] Like the instant case, the jury instructions in *Glover* carried admonitions that if upon all the evidence, including that of alibi, a reasonable doubt as to guilt was created, then the defendant should be acquitted. The Court pointed out that inclusion of general reasonable doubt admonitions in the jury instructions did not cure the prejudice created by the specific alibi charge. The confusion promulgated by combining directions to acquit only if the defendant has proved a fact, then in the same instruction directing the jury that they may acquit without the defendant having proved such fact, seems apparent. The effect of this dual charging in the same instruction was well summarized by the Glover Court: "The two propositions embraced in the same paragraph are legally incongruous, and were well calculated to confuse the understanding of the jury. . . ." 147 Fed. at 433. The same proposition arose in *Thomas*

7. *Glover* v. *United States,* 147 Fed. 426, 431:

> The underlying vice in the foregoing charge of the court is in the assumption that in respect of the alibi the burden of proof "by a preponderance of evidence, that is, by the greater and superior evidence," shifted to the defendant. *It loses sight of the fundamental rule in criminal procedure that the defendant is presumed to be innocent of the offense with which he is charged;* that this is a continuing presumption which attends him like a guarding spirit throughout the ordeal of his trial, and imposes upon the prosecution the burden of overcoming such presumption by such weight of evidence as will satisfy the minds of the triers beyond a reasonable doubt of the defendant's guilt. This reasonable doubt in his favor applies to the evidence in its entirety and necessarily to any part of it. (Emphasis added.)

v. *United States,* 213 F. 2d 30, 32-34, with the instruction first shifting the burden of proof to the accused respecting alibi, then stating that if upon all the evidence a reasonable doubt of guilt had been raised "you should acquit." A result identical with *Glover* was reached by the Court of Appeals in *Thomas.*

The latter decision indicates the widespread impact of *Glover* on the American law. 213 F. 2d at 34. While the petitioner does not contend that a Court of Appeals decision is controlling in this Court, he does urge that *Glover, Thomas,* and attendant decisions are well reasoned and worthy of significant consideration here. Why the alibi instruction in the instant case is "legally incongruous," in the words of *Glover,* appears from what it tells the jury to do. The last sentence of the alibi instruction (A. 94), as well as other instructions given the jury (A. 95), permit the jury to acquit if any evidence creates a reasonable doubt of guilt. The jury is then told in the alibi instruction that the jury is justified in acquitting the accused only if the alibi was proven by a preponderance of the evidence. Adhering to this part of the instruction, a juror who entertained a reasonable doubt of guilt as a result of the alibi proof would nonetheless be required to convict the accused unless the alibi proof prevailed "by a preponderance of the evidence." An excellent analysis of the defects in Iowa approach to alibi, and the dilemma situation presented a juror under the challenged instruction, are set forth in Comment, 49 Iowa L. Rev. 590, 591 (1964):

> The difficulty with the rules applied by the Iowa courts is that they appear inconsistent, or even if they are not inconsistent, they may be nevertheless confusing to the jury. Under the first rule, [reasonable doubt instruction] it appears that the jury would be justified in acquitting the accused if any evidence, including that supporting an alibi, created a reasonable doubt. Under the second rule [alibi instruction] it seems that

> the jury would only be justified in acquitting the accused if the alibi was proven by a preponderance of the evidence. Assuming, therefore, that evidence of an alibi does not preponderate but such evidence is sufficient to raise a reasonable doubt, if the jury follows the instruction that the evidence of an alibi must preponderate, it must convict and disregard the instructions as to reasonable doubt.

Another anomaly presents itself under the Iowa rule:

> If the defendant testifies that he was not present at the scene of the crime, no burden of proof is cast upon him and his testimony raises only the question of credibility. Thus, the jury could acquit the defendant on the basis of alibi alone when the only proof is defendant's testimony. However, if he calls witnesses to corroborate his alibi, the defendant is said to have assumed the offensive and the burden of proof by a preponderance of the evidence rests upon him. 49 Iowa L. Rev. at 596.

It would appear that under this rule the defendant is presumed innocent until he presents proof of alibi, and then the presumption dissipates and the defendant must establish his non-presence at the scene of the crime by a preponderance of the evidence. *Glover* v. *United States,* 147 Fed. 426, indicates that this approach is antagonistic to the presumption of innocence, which presumption applies to all the issues in a criminal case, including the issue of whether the accused was present at the scene. A final question in this analysis concerns the basic nature of the rights deleteriously affected by this procedure.

The presumption of innocence was described in *Coffin* v. *United States,* 156 U. S. 432, 453, 461 as the "undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." The *Coffin* decision traces the history of this presumption of innocence from the early years of the common

law. See also *Deutsch* v. *United States,* 367 U. S. 456, 471. As stated in 2 Conrad, Modern Trial Evidence § 962 (1956):

> The presumption of innocence stands as one of the highlights of Anglo-American jurisprudence. In its most concise form, it may be stated that an accused in a criminal case is presumed innocent until his guilt has been established beyond a reasonable doubt. This presumption, one of the strongest known in the law, is a principle to which the accused is lawfully entitled, and not a gratuity. It is a substantial right accruing to the benefit of the accused upon every material fact necessary to constitute guilt. The presumption, a substantive common law right rather than a rule of evidence, makes it mandatory on the state to prove defendant's guilt, rather than on defendant to prove his innocence.

The point is well summarized in a recent decision, *People* v. *Morris,* 67 Cal. Rptr. 566, 567 (Cal. 1968):

> Penal Code, section 1096 declares in part that that "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal * * *." These significant words express a cardinal rule of Anglo-American criminal jurisprudence. The presumption intended originally to ameliorate the severity of the early English common law (5 A. L. R. 3rd 76), serves not to protect the guilty but to prevent conviction of the innocent. (*People* v. *Hill,* 77 Cal. App. 2d 287, 293, 175 P. 2d 45, and cases cited; Witkin, Calif. Crim. Proc., § 39, p. 332; 14 Cal. Jur. 2d 405.) It has been described as a fundamental right and an essential element of due process of law. (See 22-A C. J. S. Criminal Law § 581 pp. 335-337, and cases cited.) It is the capstone in the protective arch of a citizen's rights when accused of crime. . . .

See also Slovenko, Handbook of Criminal Procedure 587 (1967).

The Court of Appeals below pointed out that although the Supreme Court had not passed upon the validity of the jury charge involved here, the great weight of authority supported the view that the instruction was erroneous (A. 80). Indeed, the Iowa approach is followed in only a few states, and the practice of shifting the burden of proof to an accused on the issue of alibi has been castigated by the commentators.[8]

A feature of the lower court opinion requiring mention

8. Wigmore's current listing indicates that five jurisdictions, including Iowa, shift the burden to the accused on the question of alibi. 9 Wigmore, Evidence, Sec. 2512, n. 3 (1964 Supplement). See also I Wharton, Criminal Evidence 68-70 (12th ed. 1955). It does appear that Iowa is in a slim and shrinking minority on this question. As indicated in *Leland* v. *Oregon*, 343 U. S. 790, 798, the fact that a contrary practice is followed in the vast majority of states is not conclusive that the majority practice is the one which accords with due process, but that fact is plainly worth considering.

For criticism of the practice of shifting the burden of proof to the accused on the issue of alibi, see Underhill, Criminal Evidence, Sec. 441 (5th ed. 1956); McCormick, Evidence 683-84 (1954). See also *Commonwealth* v. *Gates*, 141 A. 2d 219, 223 (1958) (Musmanno dissenting opinion); 4 Wharton, Criminal Law and Procedure 772 (1957); Chamberlyane, Evidence, Sec. 973 (1911).

The treatment of burden of proof in the alibi cases has been the subject of considerable controversy in Iowa. The forceful dissenting opinions in *State* v. *La Mar*, 151 N. W. 2d 496, 504 (Iowa 1967) and *State* v. *Stump*, 254 Iowa 1181, 1203, 119 N. W. 2d 210, 223 (1963), underline the disagreement. There has been some tendency in certain decisions to treat alibi on the same basis as pleading and proof of insanity, and to consider the question controlled by *Leland* v. *Oregon*, 343 U. S. 790. The two concepts are distinct, however, in that alibi does not raise an affirmative defense. As stated in Underhill, Criminal Evidence, Sec. 441 (5th ed. 1956):

> In most criminal cases the state must prove that accused was not present because he was elsewhere. Proof of alibi thus appears to negative an essential element of the crime rather than set up affirmative matter. Further, it is difficult to compare alibi with insanity. The reason that some jurisdictions place on defendant the burden of proving insanity is that insanity is a departure from the norm; people are presumed to be sane. There is obviously no presumption that the defendant was present at the scene of the crime.

is the apparent confusion over the concept of retroactivity. The court, intimating that the questioned jury charge may be unconstitutional, questioned whether such a rule would inure to the benefit of this petitioner. This analysis appears to overlook the guiding principles set forth in *Stovall* v. *Denno,* 388 U. S. 293. The *Stovall* decision points out that litigants in cases which make clear a constitutional requirement always obtain to retroactive benefit of the rule, even though such rule may be prospectively applied for subsequent litigants. Petitioner here has presented an original question of marked constitutional importance, and respectfully submits that a holding by this Court in accord with *Glover, Thomas,* and allied cases would unquestionably apply to him, based upon "sound policies of decision making, rooted in the command of Article III of the Constitution . . ." *Stovall* v. *Denno,* 388 U. S. at 301. The question of retroactive application does not occupy the Court at this time. Should the Court in a future case wish to limit any announced rule to cases heard after this decision, the Court certainly may do so. Nothing in the concept of retroactivity would appear to deny Gale Johnson the benefit of the Court's ruling on the alibi question presented, or to limit the Court in other future cases.

Significant and well reasoned decisions indicate that fundamental safeguards in criminal prosecutions are deleteriously affected when a trial court shifts the burden of proof to the accused. The trial court took such action in the instant prosecution, an especially damaging step in a case where alibi was crucial to the defense. The instruction may well have been sufficient to tip the balance away from the accused, where the credibility of petitioner's alibi witnesses had already been undercut by the state's production of false evidence. Considerable reliance upon the burden cast upon the accused under the court's charge appears in the prosecutor's closing argument (A. 113-14). Tradi-

tional rules of burden of proof, reasonable doubt, and presumption of innocence in criminal cases condemn the increased burden the defendant was forced to bear in the instant case.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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